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No. 451

In the Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

v.

ALLENTOWN BROADCASTING CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 315–331) has not yet been reported. The decisions of the Commission (R. 156–219, 257–263) are not yet officially reported. They may be found at 8 Pike & Fischer, Radio Regulation 31, and 9 Pike & Fischer, Radio Regulation 887.

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1954 (R. 331). The petition for a writ of certiorari was filed on Novem-

ber 16, 1954, and was granted on January 10, 1955 (R. 332). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. The Court of Appeals held that the Federal Communications Commission, in deciding between mutually exclusive applications for broadcast stations in different communities, pursuant to Section 307 (b) of the Communications Act of 1934, as amended, can determine that one community's need for a second station outweighs the needs of the other community which already has a multiplicity of local services, only if it has first found that both applicants are approximately equal in their ability to serve their respective communities. The first question is whether such a holding imposes an undue limitation upon the exercise of the administrative licensing powers of the Commission.

2. Whether, under *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, the court below improperly substituted its judgment for that of the Commission on the inferences to be drawn from undisputed facts, largely by holding that the Commission's conclusions concerning the qualifications of a proposed licensee to operate a station in the public interest, when such conclusions differ from those of its hearing examiner, must be supported by a "very substantial preponderance" in the evidence.

STATUTE INVOLVED

Section 307 (b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 49 Stat. 1475, 47 U. S. C. 307 (b), provides as follows:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

STATEMENT

This case involves the disposition by the Commission of two applications for construction permits for standard broadcast stations on the same frequency, one by Easton Publishing Company for Easton, Pennsylvania, and the other by Allentown Broadcasting Corporation for Allentown, Pennsylvania. The two applications are mutually exclusive because of the proximity of the two communities. Although neither proposed station would render broadcast service to the other community, the interference caused by either one to the other would be such as to preclude the grant of both applications (R. 180). In the decision here in issue, the Commission granted the application of Easton and denied that of Allentown

(R. 156–219).[1] On appeal by respondent, the court below, with Judge Prettyman dissenting, reversed the Commission's decision and remanded the case for redetermination by the Commission (R. 315–331).

PRIOR PROCEEDINGS—THE FIRST EASTON CASE

The Easton and Allentown applications were the subject of a full comparative hearing in proceedings which originally commenced in 1946. At that time, there were pending before the Commission, in addition to the two applications now involved, two other applications seeking facilities on the same frequency, one in Easton and the other in Allentown (R. 156). After a comparative hearing in which all four of the applicants participated, the Commission issued a decision granting the application of the present respondent for Allentown, and denying the other three applications (R. 157). Its decision was based upon the determination that the city of Allentown was in greater need of an additional broadcast facility than was the city of Easton, so that a grant to Allentown was required by Section 307 (b) of the Communications Act of 1934, as amended, 47 U. S. C. 307 (b), and that the

[1] Also before the reviewing court was a Memorandum Opinion and Order of the Commission denying Allentown's petition for rehearing of its decision to grant the Easton application (R. 257–263).

present respondent was the better qualified of the two Allentown applicants.

The Commission's decision, however, was reversed by the Court of Appeals for the District of Columbia Circuit on the ground that the Commission had not set forth the findings upon which it based the determination that Allentown had greater need of an additional service. The court remanded the case to the Commission for "findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need." *Easton Publishing Co.* v. *Federal Communications Commission,* 175 F. 2d 344, 351.

Upon remand, the Commission ordered a further hearing on the ground that the existing record was inadequate. This order was affirmed in *Easton Publishing Co.* v. *Federal Communications Commission,* 185 F. 2d 987. The decision of the Commission which is the subject of the instant case was the result of that further hearing.

THE EXAMINER'S DECISION

The further hearing was held before an Examiner of the Commission in March, May, and June, 1951. Only the two applicants now involved participated at this further hearing.[2] Evidence

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[2] The second Allentown applicant failed to participate in the first appeal and did not prosecute its application thereafter. The second Easton applicant was a party to the first

was introduced concerning the proposals of the applicants as then formulated, and the needs of the two communities in the light of the broadcast service then available to those communities. On June 11, 1952, the Examiner issued an Initial Decision proposing to grant Allentown's application and to deny that of Easton (R. 53–147).

In reaching this conclusion favoring Allentown, the Examiner found that both applicants were "legally, technically, financially, and otherwise qualified" for the licenses they sought (R. 124, 126). She made detailed findings as to the number of stations operating in each community and the nature of the service provided by them (R. 134–137, 140–141). She noted that Easton was receiving local service from only one AM station, while Allentown had three; that Easton's population was about 34,000 while Allentown's was about 106,000, with the latter growing at a faster rate; that Allentown had slightly more persons per station, but that use of such a ratio would be "an unrealistic approach" to the problem (R. 126–127, 145–146). In her statement of possible criteria by which to judge the relative needs of the two communities, she found none of those she mentioned significant (R. 145–146). She concluded, however, that the "over-all evidence in this record clearly shows a greater need

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appeal, but did not participate in the second Commission hearing (R. 156).

for additional radio service in Allentown than in Easton" (R. 146).

Though the Examiner stated no basis for the foregoing conclusion, she discussed in some detail the abilities of the two applicants (R. 131–132, 133, 135–139, 140–142). She found the experience, and integration of ownership and management, of Allentown to be slightly greater than those of Easton, but that the difference was "not of compelling degree" (R. 131–132), and that both applicants were qualified to be broadcast licensees (R. 132). She then compared their qualifications "as shown by past deeds as well as future plans" (R. 132). She thought that the preponderance of evidence in the record established that the attitude of Easton was that its radio station would be a complement to its newspaper activities (R. 133). Although she found that the three stations in Allentown (excluding that of respondent) and the lone station in Easton provided a general, balanced program service for each community (R. 135–137, 140–141), and that each applicant would not only broadcast some programs not then available from the existing stations, but also promote local talent and provide time for local civic, educational and governmental organizations (R. 136–139, 141–142), she gave more credit to the program proposals of Allentown than to those of Easton.

The Examiner further pointed out, and gave weight to the fact, that the Allentown proposals

were more than just proposals, since this applicant's station had been in operation since the first Commission decision,[3] though she also recognized that on remand from the Court of Appeals it was necessary to treat Allentown as "merely an applicant among other applicants entitled to no additional rights or privileges" (R. 139–140).

On the other hand, with respect to the program proposals of Easton, the Examiner concluded that the record did not disclose with the required certainty the program service which would be rendered by Easton if it were granted a license (R. 142–144). This conclusion was based upon what she found to be uncertainty in the testimony of Easton witnesses as to whether Easton would or would not affiliate with a national network if it were to receive a license.[4]

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[3] The Allentown applicant's station has been in operation ever since the Commission's first decision in its favor despite the subsequent reversal of that decision by the court below. Its operation continues under a stay granted by the court below of the Commission's order following its grant of Easton's application which would have ended Allentown's operating authority and empowered Easton to commence operations. As the Commission made clear in authorizing Allentown's temporary operations, this authority in no way enhances its rights or prejudices Easton in the determination of which application should ultimately be granted (R. 159–160; see also R. 139).

[4] In addition, she pointed to the fact that Easton had not been able to program its FM station in quite as elaborate a manner as it had proposed at the time it was contemplating joint AM–FM operations (R. 137). She also contrasted the fact that most of the types of programs proposed to be broadcast by Easton were broadcast over the existing Easton sta-

The Examiner further concluded that two of Easton's principal witnesses had not made the frank, candid, and honest disclosures which the Commission has a right to expect from applicants (R. 144). This conclusion was based on testimony with respect to the possible affiliation by Easton with a national network, the circulation of out-of-town newspapers in Easton, and the size of the dividend paid by the Easton applicant in 1950. Although the Examiner found this lack of candor to have significant import, she did not state what effect it had on her consideration of the competing applications (R. 145).

THE COMMISSION'S DECISION

Easton and Commission counsel filed exceptions to the Initial Decision, and Allentown filed a reply to those exceptions. Oral argument on the exceptions was heard by the Commission *en banc,* and on July 2, 1953, the Commission released its Final Decision in which, disagreeing with its Examiner, it granted Easton's application and denied Allentown's (R. 156–219). The Commission, as had the Examiner, made detailed findings of fact as to the characteristics of the communities involved (R. 162–164), the applicants (R. 165–180), the engineering proposals of the applicants (R. 180–187), the existing

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tion (R. 135–136) with the fact that a number of the types of programs carried by Allentown were not broadcast simultaneously over other Allentown stations (R. 141).

radio services in Easton and Allentown (R. 188–196), and the proposed program service of the applicants (R. 196–203).

In its Conclusions, the Commission first reviewed the evidence relating to the qualifications of each of the applicants (R. 203–209), and decided, as had the Examiner, that each was legally, technically and otherwise qualified to become the licensee of the station it proposed (R. 204–209). In reaching this conclusion, the Commission carefully considered the findings and conclusions of the Examiner with respect to the evasiveness and lack of candor of Easton's witnesses (R. 204–206) even though the Examiner had not found this to be a disqualifying factor. The Examiner had specified with great particularity the bases for her views on this subject, and the Commission concluded that her findings were based on her evaluation of the testimony of record rather than on her judgment as to the credibility of the witnesses (R. 205).[5] The Com-

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[5] In this connection the Commission stated (R. 205): "These findings were based primarily on what was thought to be conflicts in the testimony of such witnesses, the eliciting by cross-examination of certain information which the Examiner considered should have been made clear during the witness' direct testimony, and a professed lack of knowledge of a matter which the Examiner considered the witness reasonably should have known. Because of the seriousness of the matter and the fact that the Examiner's findings were primarily based on her evaluation of testimony by one witness rather than on her judgment as to the creditability of different witnesses who make contradictory statements, we feel that

mission made its own evaluation of the testimony on which the Examiner had relied and concluded on the basis of that testimony and of the record as a whole, including the Examiner's views set forth in the Initial Decision, that there was no persuasive indication of reluctance, evasiveness or lack of candor on the part of Easton's witnesses (R. 205–206). The Commission also considered the relationship between Easton's newspaper and proposed radio operation and concluded that the two media would be conducted as substantially separate operations (R. 206–207).

The Commission held that the principal issue in the proceeding was "which of the two communities involved has the greater need for additional standard broadcast service" within the meaning of Section 307 (b) of the Communications Act (R. 209). It pointed out that each community received radio service from stations located in other cities, and that in addition each community received local service, Allentown from the three stations located there, and Easton from the single station licensed in that city (R. 209–210). The Commission concluded that, in terms of the types of programs proposed to be broadcast by each applicant, each community had a need sufficient to justify the additional service and that on this basis there was little room for choice between the

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we are obligated to independently evaluate the evidence in question, giving due weight to the opinion of the Examiner and the contentions of the parties."

two communities (R. 210–211). The decisive factor in determining which community had the greater need for a new station was held to be a lack in Easton of a choice between locally originated standard broadcast programs (R. 211–212). The Commission pointed out that the importance of such a choice of locally originated programs as an element establishing a greater need under Section 307 (b) had previously been recognized by the Commission and the court below.[6]

The Commission found that the Easton applicant, which was the only applicant in the proceeding which would serve Easton, was qualified to meet Easton's need for a choice of locally originating programs (R. 214–215). In reaching this conclusion, the Commission rejected the Examiner's conclusion that the record did not disclose with the required certainty the program service which Easton would render, because of a failure to indicate which local programs would be dropped in the event that a network affiliation was later obtained.

Allentown thereupon filed a petition for rehearing (R. 228–255), arguing *inter alia* that the Commission had failed to make findings upon some twelve criteria on which a comparison of the qualifications of the applicants should have been based (R. 239–242). In its opinion denying this

[6] *Northwestern Ohio Broadcasting Corp.*, 3 Pike & Fischer, Radio Regulation 1945, affirmed, *Sky Way Broadcasting Corp.* v. *Federal Communications Commission*, 176 F. 2d 951.

petition (R. 257–263), the Commission rejected Allentown's contention that a full comparison of the relative qualifications of the applicants should have been made, once again explaining the grounds upon which it considered that decision must rest in a case such as this. It said (R. 258–259):

> This is not a case in which the Commission is called upon to consider the comparative qualifications of two or more applicants proposing to serve the same community; instead, it is a case in which one of the applicants proposes to serve Easton, Pennsylvania, and the other Allentown, Pennsylvania, and neither would provide service to the other community. Under such circumstances, the primary determination to be made is that required by Section 307 (b) of the Communications Act; namely, how best to distribute licenses among the several states and communities as "to provide a fair, efficient and equitable distribution of radio service to each of the same." In the present case, having determined that Easton, Pennsylvania with only one standard broadcast station was in substantially greater need of a second local facility than the Allentown community which already has four standard broadcast stations, we went on to consider, in accordance with the mandate of the Court of Appeals in the first Easton decision, which of the two applicants would best serve the needs of Easton,

> Pennsylvania and found that the Easton Publishing Company was such applicant. But we also recognized that in spite of the demonstrable greater need of Easton than Allentown for a new standard broadcast facility, the public interest would not necessarily be served by granting the only application for that city if the record were to have demonstrated that the Easton applicant was unable to provide adequately for the demonstrated needs of the Easton community. We accordingly went on in our decision to point out the reasons for our belief that the Easton Publishing Company station would in fact serve the needs and interests of the Easton community for a choice between locally originated programs which had led us in the first instance to favor a grant to Easton rather than Allentown.

THE DECISION OF THE COURT OF APPEALS

Reversing the Commission, the Court of Appeals held that one of the "essential underlying" findings necessary for the application of the "choice of local service" principle, upon which the Commission's decision was based, was that the respective applicants possess approximately equivalent ability to serve the needs of their respective communities (R. 317–318). The court interpreted the Commission's decision as having been based upon such a finding, and held that the finding lacked adequate support in the record as a whole.

This latter holding, in turn, centered on the Commission's disagreement with its Examiner's findings concerning (1) the program plans of the Easton applicant, (2) the asserted evasiveness and lack of candor of two Easton witnesses, and (3) Easton's ownership and use of other communications media. The Commission's findings contrary to those of the Examiner could only be sustained, the court concluded, by a "very substantial preponderance in the testimony as recorded" (R. 319–320).

Judge Prettyman, dissenting, asserted that the court had exceeded its function as a reviewing court and improperly substituted its views for those of the Commission in determining whether the public interest would best be served by a grant of the Easton or Allentown application. In his view, that policy determination was one for the Commission to make, and the function of the reviewing court was merely to decide whether the policy was reasonable and supported by the findings and the evidence (R. 324). He characterized the Commission's findings as "full, understandable, and abundant in references to the evidence" and more than adequate to support the Commission's conclusions (R. 323). With respect to the alleged evasiveness of Easton's witnesses, Judge Prettyman held that the court had engaged in a "wide departure from the proper purpose and use of the demeanor test in respect to testimony" and had misapplied the decision of this Court in

Universal Camera Corp. v. *National Labor Relations Board,* 340 U. S. 474 (R. 325–330).

SUMMARY OF ARGUMENT

I

Section 307 (b) of the Communications Act directs the Commission in granting licenses for broadcasting stations to "provide a fair, efficient, and equitable distribution of radio service" to the various states and communities. The court below did not question, and has in fact approved, the Commission's long-established policy of making the need for service its overriding concern where mutually exclusive applications are filed for stations to serve different communities. The court rejected, however, the Commission's determination that the city of Easton, because it had only one local station and therefore lacked a "choice of local service," had greater need for a second local station than Allentown had for a fourth. The court held that the "choice of local service" principle may be applied only where (1) the respective abilities of the competing applicants are "about equal" and (2) there is, apart from the problem of choice of local service, "approximately equivalent community need" (R. 317). Neither of these qualifications is supportable.

In laying down these criteria governing licensing of radio stations, the court entered into a domain of policy considerations rather than is-

sues of law. Congress declared a broad mandate of licensing policy in Section 307 (b), which the Commission properly implemented by its "choice of local service" rule. That rule, as stated by the Commission and applied by it in the present case, represents a reasonable and appropriate exercise of the licensing power granted it by Congress. The court below overstepped its function of reviewing for errors of law by attempting to substitute its own formulation of the "choice of local service" rule for that adopted by the Commission.

A. The Commission found that the city of Easton had the greater need for an additional station. It also found, as had its Examiner—and the court below does not appear to have disagreed—that the Easton applicant alone was qualified to serve this need. The Commission properly ended its inquiry here. There was no reason to attempt to compare the ability of the Easton applicant to serve Easton with the ability of the Allentown applicant to serve Allentown once it was determined that Easton's need was greater, that the new station should therefore be established at Easton rather than Allentown, and that only the Easton applicant proposed to, and was qualified to, operate a station in Easton. Before the instant decision, the court below had recognized that the Commission had ample authority so to treat such competing applications for stations in different communities.

Radio Cincinnati v. *Federal Communications Commission*, 177 F. 2d 92. Its contrary conclusion here misconstrues the mandate of Section 307 (b).

B. The "choice of local service" principle is an obviously sound factor in determining need, and accords with the policy of Section 307 (b) as expressed in both its language and its legislative history. There is no basis for the view of the court below that this principle may be applied only when the need of communities competing for service is "approximately equivalent" in all other respects. The provision of outlets for local self-expression is properly deemed by the Commission to be a major need in itself, independently significant, appropriately weighed along with other elements of need. Its importance in a particular case, which is for the Commission to weigh, turns, of course, upon the facts of the case. But there is no reason for—and substantial reason against—lowering it to the position of insignificance it is given, apparently as a matter of law, by the decision below. The court below, in effect, transformed what is essentially a question of administrative judgment for the Commission into one of law, for a reviewing court finally to determine.

II

A. The Examiner found that in three instances witnesses for the Easton applicant had been eva-

sive and lacking in candor. The Commission examined these findings with care. It found from the Examiner's decision that they were based on analysis of the content of the testimony in question rather than on the demeanor of the witnesses. It concluded (R. 205) from its own analysis of these bits of testimony and the record as a whole that there was "no persuasive indication of reluctance, evasiveness or lack of candor on the part of the Easton witnesses, and that, to the contrary, the testimony of such witnesses, properly viewed, gives an overall appearance of consistency, candor, and straightforwardness."

The court below, holding that the Examiner's finding of lack of candor was not "derived solely from evidence preserved in the printed record" (R. 319, fn. 21), concluded that the Commission could not disagree with its Examiner "without a very substantial preponderance in the testimony as recorded" (R. 319–320). In this, the court misconceived the nature of the finding in question and of this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474.

1. There is no doubt that the trier of facts who sees and hears the witnesses is uniquely able to draw inferences from "demeanor evidence" and that such "testimonial inferences" are entitled to great weight. It is necessary to distinguish inferences drawn from analysis of the testimony

itself—so-called "derivative inferences"—where truth or falsity of the statements is not in issue, but an effort is made to determine motive or purpose from what is said, when it is said, and the kind of questioning required to elicit the information. The latter kind of inference is involved here.

The Examiner's decision makes clear that her inference of "lack of candor" was not based on the bearing or demeanor of the witnesses but on what they said and left unsaid. Thus when a witness could not recall a dividend figure from memory, but said he would have to consult records to supply it, the Examiner questioned his candor because she thought he *must have* had the figure in his head, not because of his manner of stating the contrary. The rest of her discussion on this issue is similar. Indeed, she explicitly refers at one point to her "study of this record" (R. 144) as the basis for finding a lack of candor.

The Commission, as was its duty, made its own "study of this record," including the brief portions which give rise to the present issue. It reached the carefully reasoned conclusion that the characterization of Easton's witnesses as evasive was wholly unwarranted. Particularly with respect to findings of the type in question, the ruling below that the Commission could be sustained only by "a very substantial preponderance in the testimony" is erroneous.

2. This Court's opinion in *Universal Camera* expressly stated that the "responsibility for decision * * * placed upon the [agency] is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are 'clearly erroneous.'" 340 U. S. at 492. The rule thus rejected is in effect adopted by the decision below. The result of the test announced in this case is to divert attention from the proper question on review—whether the *agency's* decision is supported by substantial evidence on the record as a whole—to the question whether there was evidence requiring the court to "affirm" the examiner. To be sure, the formula by which the standard of review is stated is not in itself the most significant objective in this area which must by its nature be to a considerable extent "unruly" (see *Universal Camera, supra,* at 493). But the error we assert in the rule announced below serves at least to state the point of importance here—that, judged by a proper standard of review, the Commission's disputed findings should have been affirmed.

3. We believe that, as Judge Prettyman's dissent demonstrates, these findings were more reasonable than those of the Examiner which the Commission rejected. At worst, the findings of the Examiner and the Commission presented a "choice between two fairly conflicting views" in which those of the Commission should have prevailed. *Universal Camera, supra,* at 488.

B.1. The Commission found no basis for the Examiner's finding that, because the Easton applicant could not know whether it would obtain a network affiliation in the future and what local programs would be displaced if such an affiliation were obtained, its program plans lacked the requisite certainty. There was no problem here of disputed evidence. The Commission's judgment is the very type of expert appraisal for which the Commission exists and which it must make in case after case. In substituting its contrary judgment, the court below erred.

2. The Commission noted that the Easton applicant owned Easton's only newspaper and television station and one of Easton's two FM stations. The Commission also found that this applicant had in the past failed to carry program logs of Easton's one AM radio station, but had commenced carrying them in 1948. Indicating its disapproval of this latter practice, the Commission found that these facts as to ownership of other media did not disqualify the applicant as a licensee.

Neither the Examiner nor the court below disagreed with this conclusion. The court thought, however, that the Commission, like the Examiner, should have appraised these facts in "weighing the relative abilities of the competing applicants." If, as we argue in Point I, no such comparison was necessary or proper, the problem here disappears.

The Commission's decision actually brings competition in AM broadcasting to Easton, where a single AM station owned by another licensee has heretofore had a monopoly. Accordingly, it cannot be said that the Commission's judgment on this matter was unreasonable and erroneous as a matter of law.

ARGUMENT

I. THE COMMISSION CORRECTLY DECIDED THAT THE NEED OF EASTON FOR A SECOND LOCAL STATION WAS GREATER THAN THE NEED OF ALLENTOWN FOR A FOURTH, AND THAT THE EASTON APPLICANT, THE ONLY ONE SEEKING AND QUALIFIED TO SERVE EASTON'S NEED, SHOULD ACCORDINGLY BE LICENSED

Section 307 (b) of the Communications Act (*supra*, p. 3) directs the Federal Communications Commission, in considering applications for licenses, modifications, or renewals, to

> make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

The plain and overriding objective of this mandate is that the Commission shall supply equitably the *needs* of the various states and communities for radio service. Where, as in this case, there are presented mutually exclusive license applications, and where the applicants propose to serve different communities, the Com-

mission's primary duty and authority under the statute, assuming both applicants are qualified to perform the respective services for which they seek a license, is to determine which of the communities has the greater need.

Accordingly, in reversing the Commission's earlier decision in this case for failure to elucidate the reasons for its determination, the court below had remanded with instructions that the Commission determine and make proper findings as to "*the comparative needs of the two communities* for new radio service and the relative abilities of the two applicants to serve *the greater need.*" *Easton Publishing Co.* v. *Federal Communications Commission,* 175 F. 2d 344, 351 (emphasis added). Pursuant to this mandate, the Commission (and its Examiner) made undisputed findings that (1) only one of the two applications remaining before it could be granted, because a grant of both would result in "mutually prohibitive interference" (R. 127, 180, 204); (2) that the Easton applicant could serve only Easton, and the Allentown applicant only Allentown (R. 128, 130, 180, 214); (3) that the city of Easton was receiving local service from only one standard (AM) broadcasting station, while Allentown was receiving such service from three stations in Allentown, plus a substantial amount from a fourth station in Bethlehem (R. 69, 188, 191); and (4) that each applicant was qualified to pro-

vide the service (to Easton and Allentown, respectively) for which it sought a license (R. 132, 204, 209).[7]

The Commission went on to find (R. 211) that, separately considered, "each community might well be found to have a need sufficient to justify an additional service of the type proposed by the applicants," and that there was in most respects "little room for choice between the two communities." The Commission further found, however, that there was "one decisive factor" favoring Easton—the fact that this city was receiving locally originated programs, providing opportunities for local self-expression, from only one station, while Allentown received such service from three stations. And the Commission concluded that the need of Easton for a second local service was greater than the need of Allentown for a fourth.

Reversing this decision, the court below stated as follows the crux of its disagreement with the Commission (R. 317–318):

> This "choice of local service" principle is a gloss on § 307 (b) of the Communications Act of 1934, *supra*. It was first applied by the Commission in *Northwestern Ohio Broadcasting Corp.*, upon the crucial findings that the choice between the two com-

[7] Although, as shown by the portions of the record to which we refer, the Examiner as well as the Commission found both applicants qualified, the Examiner made findings, rejected by the Commission, which cast doubt upon Easton's qualifications. We treat this aspect of the case in Point II, *infra*.

> munities was "indeed a difficult one" and that both applicants propose[d] to render meritorious program services designed to meet the needs of the respective communities * * *." Since we affirmed on appeal because there was "no error in the record," our approval of the "choice of local service" principle was limited to its application in circumstances of otherwise approximately equivalent community need and applicant ability to serve such need. Although in the present case the Commission purported to find such equivalence, we think *there is no substantial evidence in the record as a whole—including the Hearing Examiner's Initial Decision—to support the essential underlying finding that the ability of the applicants to serve their respective communities was about equal.* Hence, we hold the Commission's error is fatal to the order under review and requires that the case be remanded for reconsideration by the Commission. [Emphasis added.]

Thus, the Court of Appeals held crucial the Commission's failure to find that the Easton applicant's ability *to serve Easton* "was about equal" to the ability of the Allentown applicant *to serve Allentown.* The Commission had found it unnecessary to make any such comparison, since Easton's need had been found greater than Allentown's, and since only the Easton applicant proposed "to originate programs in and for the Easton community and to provide a primary service to that

community" (R. 214; and see R. 258–259). Nevertheless, the court below found the absence of such a comparison a fatal defect. It also held that the Commission's "choice of local service" principle could apply only "in circumstances of otherwise approximately equivalent community need" (R. 317), though it did not disagree with the Commission's finding of such equivalence in this case.

We submit that the Court of Appeals majority erred in both of the policy judgments it undertook to substitute for those of the Commission. We urge, of course, that such judgments are for the Commission rather than the courts. Apart from this, we believe the requirement of Section 307 (b) of the Act was correctly met by the Commission's decision that the City of Easton, because it had the greater need, should be awarded the new station. And we note the striking contrast between the decision of the court below in this case and its earlier resolution of the same type of problem in *Radio Cincinnati* v. *Federal Communications Commission*, 177 F. 2d 92.

A. THE COMMISSION WAS NOT REQUIRED BY THE ACT, AS A NECESSARY CONDITION TO ISSUANCE OF A LICENSE, TO ATTEMPT TO COMPARE THE ABILITY OF THE EASTON APPLICANT TO SERVE EASTON WITH THE ABILITY OF THE ALLENTOWN APPLICANT TO SERVE ALLENTOWN

The overriding standard for the grant of a broadcast license, set forth in Section 307 (a), 47 U. S. C. 307 (a), of the Communications Act, is that

it shall be in the public interest, convenience, and necessity. In the main, the specific content of this general standard has been supplied through the years by the exercise of Commission judgment; the role of judicial review, as this Court has made clear, is simply to correct errors of law, not to substitute new judgments of policy. *National Broadcasting Co.* v. *United States,* 319 U. S. 190; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134. Congress has left the development of criteria for the grant of license applications to the Commission with the single major exception[8] that it has specifically required in Section 307 (b) that the Commission arrive at a fair, equitable, and efficient distribution of radio services among the several states and between different communities therein. This section is the only one which contains a specific guide governing the Commission in its disposition of applications for radio licenses.

There is no doubt—and the court below suggested none—that the purpose and effect of Section 307 (b) is to require that in any proceeding where the Commission is called upon to grant a license to one of several qualified applicants seeking mutually exclusive licenses to serve different communities or areas, its choice must be governed by the command "to provide a fair, efficient, and

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[8] Section 310 (a) of the Act, 47 U. S. C. 310 (a), prohibits the grant of radio licenses to aliens.

equitable distribution of radio service" among the states and communities. Buttressing the inevitable conclusion from the language of the statute, its legislative history emphasizes the objective of satisfying equitably competing needs for radio broadcasting service.[9]

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[9] Section 9 of the Radio Act of 1927 (44 Stat. 1166) contained language virtually identical with that of the present Section 307 (b). The language was amended in 1928 by the so-called Davis Amendment (45 Stat. 373), which required that licenses for stations be assigned in strict accordance with the population of the five zones into which the United States was divided in another section of the Act and to communities within each zone according to population. (See p. 42, *infra.*) The Davis Amendment was written into Section 307 when the Communications Act was enacted, with an additional proviso exempting licenses for stations of 100 watts power or less from the requirements of the section if the grant of such licenses would serve the public interest and if such stations would not interfere with other stations' licenses under the section (48 Stat. 1084). In considering applications for licenses for stations of 100 watts power or less the Commission applied the spirit of the remainder of the section, and granted such applications "where interference would not result and when the need [for such stations] has been established." Third Annual Report of the Federal Communications Commission (1938), p. 28.

The present language of Section 307 (b) was enacted in 1936 (49 Stat. 1475). In adopting this last amendment, Congress made it plain that it was attempting more effectively to meet the needs for radio services of the various communities and sections of the country. It noted that under the Davis Amendment the various sections of the country had not been "adequately supplied" with radio services and that its policy to achieve an equitable distribution of radio facilities had been "very difficult of effectuating." S. Rep. No. 1588, 74th Cong., 2d Sess., on S. 2243, pp. 2–3; H. R. Rep. No. 2589, 74th Cong., 2d Sess., on S. 2243, p. 3. See 80 Cong. Rec. 6032.

The Commission has followed the statute's requirement. When confronted with competing applicants proposing to serve different communities, the Commission, after ascertaining whether the applicants are qualified to be licensees, customarily determines which of the communities or areas for which service is proposed is in greater need of such service. *E. g., Northwestern Ohio Broadcasting Corp.*, 3 Pike & Fischer, Radio Regulation 1945, affirmed, 176 F. 2d 951 (C. A. D. C.); *Metropolitan Broadcasting Co.*, 5 Pike & Fischer, Radio Regulation 532; *Huntington Broadcasting Co.*, 5 Pike & Fisher, Radio Regulation 721.[10] This approach to the problem has received the express approval of the court below (which under Section 402 (b) of the Act is the only court having jurisdiction of appeals from Commission hearing orders). *Radio Cincinnati* v. *Federal Communications Commission*, 177 F. 2d 92; *Huntington Broadcasting Co.* v. *Federal Communications Commission*, 192 F. 2d 33. And, as noted above, that court in its first decision in the instant

[10] Although in the *Huntington* case the Commission did not base its choice on relative community need, this was only because the Commission concluded that the record did not show that either community had a need greater than the other. However, this case sets forth clearly the type of analysis made by the Commission where Section 307 (b) must be considered, for it was only after concluding that no choice could be made under Section 307 (b) that the Commission made a full comparison of the applicants' qualifications to determine which application should be granted.

proceedings held that this procedure should be followed here, and accordingly remanded the case to the Commission for "findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need." *Easton Publishing Co.* v. *Federal Communications Commission*, 175 F. 2d 344, 351.[11]

The Commission correctly followed the requirements of Section 307 (b) when, having determined

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[11] Judge Prettyman, who dissented from the decision under review here, wrote the earlier opinion for himself and two judges other than those constituting the majority of the present panel. A word of explanation may be appropriate to clarify the requirement on the earlier remand that the Commission determine not only "the comparative needs of the two communities," but also "the relative abilities of the applicants to serve the greater need." It is to be noted, first of all, that there were originally four applicants in this proceeding, two from Easton and two from Allentown. At that stage, therefore, whichever community was found to have the greater need, there appeared to be at least two applicants seeking to supply the need. In addition, the court found in the earlier case that it could not tell why, "if Allentown's need was greater, * * * [the Commission] concluded that the intervenor [the Allentown applicant] would supply that need to a greater extent than would the appellant [the Easton applicant]." 175 F. 2d at 349. In other words, it was not made clear to the court in the earlier appeal that only the Easton applicant proposed to serve Easton's need and only the Allentown applicant proposed to serve Allentown's. This point is perfectly clear now, however. *Supra*, pp. 3, 12, 24. It demonstrates the consistency of Judge Prettyman's opinions on each appeal and the error of respondent's assertion (Br. in Opp. 5, 6) that the Commission attempted to ignore the earlier mandate.

that Easton's need for service was greater than Allentown's and that only the Easton applicant proposed and was qualified to serve this "greater need," it awarded the license to this applicant. In its Memorandum Opinion and Order denying rehearing, the Commission answered in detail Allentown's complaint that the Commission had failed to compare the *relative abilities* of the competing applicants to serve their respective communities (R. 258–259). The Commission pointed out the inherent difference between a proceeding in which two or more applicants are seeking to serve the same community, and one like the instant case, in which each applicant proposes to serve a different community and neither would provide service to the other. In the former situation, the Commission observed, a comparison of the sort suggested by Allentown would be appropriate. But where different communities are involved, the Commission explained, the "primary determination" to be made is the one required by Section 307 (b) of the Communications Act—how to distribute licenses so as best to achieve a fair and equitable distribution of service among the *communities* involved.

The Commission went on to explain (R. 259) that its determination that Easton, with only one station, was in substantially greater

need of a second facility than Allentown was of a fourth, had by no means been the end of its consideration. Instead, it had gone on to determine that the Easton applicant was the only one of the two competitors who could serve "the greater need." And it had recognized, of course, that "the public interest would not necessarily be served by granting the only application for that city [Easton] if the record were to have demonstrated that the Easton applicant was unable to provide adequately for the demonstrated needs of the Easton community." So its decision had necessarily included a determination (R. 214) that the Easton applicant was fully capable of serving the need of the Easton community for the choice of local programming which had led the Commission to favor Easton over Allentown in the first instance.

The reversal of this decision by the court below proceeds, in our view, in two erroneous steps. The court found (R. 317–318) an absence of substantial evidence "to support the essential underlying finding that the ability of the applicants to serve their respective communities was about equal." As we have emphasized, the Commission explicitly eschewed any effort to make such a finding. But the point of obviously greater importance now is the holding of the court that a finding of this kind is "essential." It is this holding which constitutes the court's basic error.

If the mandate of Section 307 (b) is to be enforced, the relative abilities of the applicants to serve "their respective communities" cannot affect the grant of the license once it is determined that one community has the greater need and that only one applicant is qualified to serve that need. We put to one side in this assertion the serious question whether any meaningful comparison could normally be made between the ability of one applicant to serve the needs of City *A* and the ability of another applicant to serve the different needs of City *B*. Assuming the feasibility of such a comparison, the grant of a license to an applicant "better qualified" to serve the community which has the lesser need for the service could only result in an inequitable distribution of radio facilities, contrary to the express mandate given the Commission by Congress. The allocation of radio facilities under such a standard would not be governed by principles of fairness, efficiency, and equity to the communities, but by the relative excellence or mediocrity in some abstract sense of the service proposed by the competing applicants. Applicants for facilities in larger cities with multiple existing services can frequently be expected to present more elaborate proposals than competing applicants for smaller communities where financial and talent resources may be more limited. Thus, under the test deemed controlling by the court below, an impressive ability to serve a modest need of one city

might outweigh a merely sufficient ability to serve a more pressing need of another city. But Congress left no room—it certainly imposed no requirement of law, enforceable by a reviewing court—for speculation along such lines. It directed the Commission to give priority to the applicant qualified to supply the need of the under-served community.

Accordingly, the Commission properly held that the first determination it was required to make was which community had the greater need for an additional station. Once the greater community need was ascertained, the relative abilities of the applicants could have been material only insofar as they related to the serving of that need. Having found that the 35,000 people of Easton had a greater need for a second station providing an outlet for local self-expression than the need of Allentown's 106,000 people for a fourth station, the Commission carefully considered the qualifications of the Easton applicant, and the service it proposed to render, to determine whether it would fulfill Easton's need. This inquiry could not logically involve any comparison of the qualifications of the Easton and Allentown applicants, for it was clear and undisputed that the Allentown applicant did not propose to and could not serve Easton's needs.[12] The in-

[12] In some situations it is possible that applicants for stations in two communities not far removed from one another would each render local service to both communities (com-

quiry was properly ended with the finding—made by the Examiner as well as the Commission, and apparently accepted by the court below (but see pp. 47 *et seq.*, *infra*)—that the Easton applicant was in fact qualified to serve the need of its community for a choice between locally originated programs.[13]

In an earlier decision, *Radio Cincinnati* v. *Federal Communications Commission*, 177 F. 2d

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pare, in this case, the service rendered by a Bethlehem station to Allentown). It might happen in such a case that the greater need of Community A might be better supplied by a proposed station in Community B. In such a situation, there would of course be an occasion for a significant comparison between the applicants, but in terms of their ability to serve a single—the greater—need. Compare fn. 11, *supra*, p. 31.

[13] The Commission concluded (R. 214):

"Since only the Easton Publishing Company proposes to originate programs in and for the Easton community and to provide a primary service to that community, we think it obvious that the proposal of the Easton Publishing Company will more adequately meet the needs of the Easton community than will the proposal of the Allentown Broadcasting Company. The Easton applicant proposes to devote approximately 25% of its total broadcast time to live programs of local origin and, as previously noted, will provide a well-rounded program service including religious, agricultural, educational, news, discussion, and talk programs. We believe that these proposals for varied types of programs with a substantial amount of programming to be of local origin will, if carried into effect, result in a program service designed to meet the local needs and interests of the Easton community, and especially the need for a choice between locally originated programs. We are convinced, therefore, that a grant of the Easton application will be in the public interest."

92, contrary to its holding in the instant case, the court below approved precisely the result for which we contend here. The opinion merits quotation at some length (177 F. 2d at 94):

> It should be noted at the outset that this case does *not* involve the problem of choosing which of two competing applicants is the better qualified to serve the public interest. The problem of which, as between WKRC and WJIM, of the two broadcast companies has the better staff or the better financial resources or the better programming never required decision by the Commission in this case. Rather, it is conceded by all in this case that both WKRC and WJIM were and are fully qualified to perform the services which they proposed to perform in their respective applications and that their equipment, with the exception of directive antenna, would comply with the Commission's Standards of Good Engineering Practice. *The problem confronting the Commission in reaching the decision from which this appeal was taken was basically one of proper distribution and allocation of facilities as required in the public interest.* We believe that the Commission achieved a completely correct solution of the problem in this case as will be seen below.
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> * * * * *
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> The ultimate issue resolved by the Commission's decisions from which this appeal was taken was basically a geographical

> one, namely, whether public need for standard broadcast facilities would be better satisfied by a grant to the Lansing station or to the Cincinnati station. That the resolution of this problem in favor of WJIM was entirely reasonable and fair as well as legally sound is forcefully demonstrated by the * * * facts which lie beyond dispute upon the record in this case. * * * [All italics except first added.]

B. THE DESIRABILITY OF A "CHOICE OF LOCAL SERVICE" IS PROPERLY DEEMED AN INDEPENDENTLY SIGNIFICANT FACTOR IN DETERMINING A COMMUNITY'S NEED FOR ADDITIONAL LOCAL SERVICE

The court below indicated that the "choice of local service" principle, which it characterized as "a gloss on § 307 (b) of the Communications Act," is pertinent only "in circumstances of otherwise approximately equivalent community need" (R. 317). It is not clear that this observation was necessary to the court's decision in this case, for the court expressed no disagreement with the Commission's view that, in respects other than available "choice of local service," there was a close equivalence between the needs of Easton and Allentown for an additional station. It seems likely, nevertheless, that the minor, residual significance the court attached to the factor singled out by the Commission as "decisive" (R. 211) explains to some degree its rejection of the Commission's decision. And it will, in any event, clarify the inquiry here to state the Commission's

position that the objective of supplying a community with a choice of locally originating programs is not merely the lowest item on a list of factors comprising the need for service, to be weighed in the balance of community needs only when there is no other point of distinction. This factor is in itself a substantial element of any case in which it appears, entitled always to be weighed in determining the needs of competing communities for additional service.[14] It accords with the policy of Congress expressed long ago (see pp. 42–43, *infra*) that equality in radio service means equality in local transmission facilities as well as in sheer number of radio signals which can be heard. See *Newark Broadcasting Corp.*, 11 F. C. C. 1269, 1271 (on rehearing).

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[14] Respondent's brief opposing certiorari contains the undocumented and erroneous assertion (p. 8, fn. 7) that the Commission, if its decision here were upheld, would later grant "routinely" an application by the Easton applicant to move its station to Allentown. To the contrary, the Commission has made it clear that the mandate of Section 307 (b) requiring equitable distribution of radio service governs not only contested proceedings like the one here but also cases in which a licensee applies to move its station from one community to another, even when such an application is unopposed. *WDZ Broadcasting Co.*, 4 Pike & Fischer, Radio Regulation 302 (application for authority to move station from one city to another designated for hearing on issues "relating primarily to whether the proposed move would provide a fair, efficient and equitable distribution of radio service to the communities concerned"); and see *Ark-Valley Broadcasting Co.*, 7 Pike & Fischer, Radio Regulation 77, 78–79.

This position reflects what we believe to be an obviously sound judgment that the public interest is furthered when the people of a community are provided wherever possible with a program service adapted to their needs, affording outlets for local self-expression and programs geared to local interests. Implementing this principle, the Commission has repeatedly held that a first outlet for local self-expression in one community is a more pressing need than the desire for a multiplication of outlets in larger communities.[15] Similarly, in *Northwestern Ohio Broadcasting Corp.*, 3 Pike & Fischer, Radio Regulation 1945, affirmed, 176 F. 2d 951 (C. A. D. C.), the Commission extended this doctrine and held, as here, that a community of substantial size should be granted a second local station in preference to granting additional local service to a larger community already enjoying a number of locally originating services. This policy has not only been applied in subsequent standard broadcast cases,[16] but has been adopted in the allocation plan promulgated by the Commission to govern the assignment of television

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[15] *Newnan Broadcasting Co.*, 11 F. C. C. 1369; *Lee-Smith Broadcasting Co.*, 12 F. C. C. 589; *Finger Lakes Broadcasting System*, 11 F. C. C. 528; *WMAK, Inc.*, 11 F. C. C. 850; *Southern Media Corp.*, 11 F. C. C. 688.

[16] *Lake Huron Broadcasting Corp.*, 6 Pike & Fischer, Radio Regulation 1185; and see *Vermilion Broadcasting Corp.*, 7 Pike & Fischer, Radio Regulation 602 (b).

stations throughout the country. See 17 F. R. 3912.[17]

The policy of seeking to provide a "choice of local service" is peculiarly within the competence of the Commission in administering Section 307 (b). In every case, the views of the agency charged with the implementation of such a provision are entitled to great weight. *National Labor Relations Board* v. *Hearst,* 322 U. S. 111, 130–133. This is particularly true where Congress, as in this instance, has deliberately left to the agency the task of formulating specific rules

[17] In the Report and Order in the rule-making proceeding which resulted in the adoption of the Commission's nationwide television allocation plan, the Commission stated that in attempting to carry out the objectives of Sections 1 and 307 (b) of the Communications Act, 47 U. S. C. 151, 307 (b), it based its determinations on principles which were expressed in terms of the following priorities:

"Priority No. 1: To provide at least one television service to all parts of the United States.

"Priority No. 2: To provide each community with at least one television broadcast station.

"Priority No. 3: To provide a choice of at least two television services to all parts of the United States.

"Priority No. 4: To provide each community with at least two television broadcast stations.

"Priority No. 5: Any channels which remain unassigned under the foregoing priorities will be assigned to the various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities."

and criteria for effectuating the broadly stated objectives of fairness, efficiency, and equity.

The legislative history of Section 307 (b) leaves no doubt that the effectuation of the general mandate of the section was to be accomplished through the exercise of Commission judgment. Congress had attempted in the Davis Amendment (fn. 9, *supra,* p. 29) to set forth the precise method by which the objectives of the section were to be accomplished. It provided, in pertinent part (45 Stat. 373):

> It is hereby declared that the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible, make and maintain an equal allocation of broadcasting licenses, * * * to each of said zones when and insofar as there are applications therefor; and shall make a fair and equitable allocation of licenses * * * to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population.

The Davis Amendment was repealed and the present language of Section 307 (b) enacted because the Federal Communications Commission had found that the drawing of artificial zone lines as guides in allocating radio facilities could not be accomplished satisfactorily. S. Rep. No. 1588,

74th Cong., 2d Sess., on S. 2243, pp. 2–3; H. R. Rep. No. 2589, 74th Cong., 2d Sess., on S. 2243, p. 3. The desire of the Congress to leave the problem of devising the best method for meeting the needs of the various communities and sections of the country to the judgment of the Commission was made abundantly clear in the debate on the bill (80 Cong. Rec. 6032):

> The purpose is to restore the provisions of the original act. The original act contained practically the same provisions as the bill in question. Later there was agitation to divide the country into various zones, and to provide that the Commission should allocate radio frequencies only to those particular zones. The engineers of the Commission and the Commission itself since that time have found many difficulties in allocating frequencies to particular zones; and they desire to have the matter left to their discretion, because the zone idea has tied them down on account of the contour of the country in some places, and so forth.

It is clear that the choice of local service principle is an implementation of the Congressional objective, for it accords significant weight to the needs of any community for local transmission facilities, as distinguished from the reception of radio service, and the Davis Amendment specifically referred to the equality of transmission as well as reception services.

As against the Commission's judgment that a choice of local service may in any case constitute a weighty desideratum, the court below suggested no reason for its statement that this factor must in all cases be subordinated to any other conceivable consideration bearing upon the need of a community for service. In a time when the loss of opportunities for local self-expression and individualization is widely decried, it is difficult to perceive how such a view could be justified. To be sure, the Commission has never argued, at the other extreme, that provision for a choice of local programming must always be the decisive concern. It has held only, and we urge here, that this is a factor among others, to be accorded the weight warranted by the facts of the particular case. The weight to which it is entitled in a particular case presents a matter for exercise of administrative judgment and policy, not a question of law to be determined by a court on review.

In the instant case, the Commission concluded, after finding the other factors evenly balanced, that the need for a choice of local service was decisive. The careful findings and reasoning underlying this conclusion [18] should not have been

[18] Judge Prettyman, dissenting below, stated (R. 323): "I have never seen more meticulous compliance with the requirements for findings by an administrative agency. There are sixty printed pages of them. They are full, understandable, and abundant in references to the evidence.

"The reasoning upon which the Commission reached its

disturbed upon review. The court below erred in laying down an unsupportable rule of law that choice of local service is the least of the possible elements of need.

II. THE COMMISSION PROPERLY REVERSED THE CONCLUSIONS OF THE HEARING EXAMINER WITH RESPECT TO THE QUALIFICATIONS OF THE EASTON APPLICANT

The Commission's Trial Examiner concluded that the Easton applicant (R. 126), as well as the Allentown applicant (R. 124), was "legally, technically, financially, and otherwise qualified to become the licensee of the radio broadcast station proposed in its application here under consideration." She also found, however, in comparing the respective abilities of the applicants (see R. 132), (1) that because it had failed to detail which local programs would be eliminated if it later secured a network affiliation, the Easton applicant had not disclosed "with the required certainty the program service which would be rendered by the proposed station at Easton" (R. 143–144); and (2) that "on this and other subjects", Easton witnesses had "not made the frank, candid, and honest disclosures * * * which the Commission has a right to expect of an applicant" (R. 144; see, generally, R. 143–145).

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ultimate decision is clearly stated and is fully justified by the record."

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The Commission considered in detail and rejected both of these findings, concluding (1) that program proposals "are not a rigid straitjacket beyond which future operation must never vary" and that the possibility of a future network affiliation did not render Easton's proposals "so uncertain as to preclude any findings or conclusions based thereon" (R. 214–215); and (2) that the Examiner's characterization of Easton's witnesses as lacking candor, "based primarily, if not exclusively, upon her interpretation of the testimony offered rather than the demeanor of the witnesses involved" (R. 260, n. 2), was unwarranted (R. 204–206, 260–261). In the decision of the court below (R. 318–320), these disagreements of the Commission with its Examiner are the basis for the conclusion (R. 317–318) that there was "no substantial evidence in the record as a whole * * * to support the essential underlying finding that the ability of the applicants to serve their respective communities was about equal." The court concluded that under *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, findings like those of the Examiner here concerning candor cannot "'be overruled without a very substantial preponderance in the testimony as recorded.'" (R. 319–320, quoting *National Labor Relations Board* v. *Universal Camera Corp.*, 190 F. 2d 429, 430 (C. A. 2, on remand from this Court).) In addition, the court held the Commission's findings inade-

quate on a third phase of the record; it held (R. 322) that on remand "the Commission must re-evaluate the effect of the Easton Company's news monopoly and its past conduct *on the issue of the relative abilities of the two applicants* to serve in the public interest." (Emphasis added.)

It should be noted that all three of the matters thus presented—certainty of program plans, candor, and monopoly—are specifically related by the court below to the "issue of the relative abilities of the two applicants * * *." For apart from this question of comparison, the court expressed no disagreement with the Examiner's and the Commission's conclusion that the Easton applicant was "legally * * * and otherwise qualified" to serve the need of Easton for an additional station. It might appear, therefore, that if we are correct in Point I of this brief—if, that is, there was no occasion to compare the applicants' relative abilities once it was determined that the Easton applicant alone was qualified to serve Easton's greater need—it becomes unnecessary to consider the further problem discussed here.

We believe, however, that resolution of this problem is in fact fairly required for a proper disposition of the case. This is so, at least, with respect to the Commission's rejection of the Examiner's findings that Easton's witnesses were reluctant, evasive, and lacking in candor. As the Commission said (R. 204), despite the Examiner's stated conclusion that Easton was qualified, these

findings raised a "serious question as to the qualification of the Easton applicant to be a radio station licensee * * *." Cf. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223, 227. The Commission did not hold that it would have granted Easton's application had it agreed with these findings or felt bound, despite its disagreement, to accept them as correct. And it is plain, of course, that the Commission saw a need to consider these findings at some length and in detail, ultimately concluding that they were incorrect (R. 204–206, 260–261).

Accordingly, we undertake here to demonstrate that the court below erred in holding that the record could not justify the Commission's rejection of some of its Examiner's findings. The holding rests, in our view—and in the view of Judge Prettyman, dissenting below—upon a misconception of the nature of the findings in issue and of this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474. Granting the weight to which the Examiner's conclusions were entitled, and which they were accorded by the Commission in its evaluation of the record, the decisive point remains that the Commission's basic findings on the subsidiary matters in issue were carefully considered, closely reasoned, and supported by substantial evidence on the record as a whole.

A. THE COMMISSION'S FINDINGS AS TO THE ALLEGED EVASIVENESS AND LACK OF CANDOR

The Examiner's findings that witnesses for the Easton applicant had been reluctant, evasive, and lacking in candor were related in her decision to three portions of the testimony, scattered through some thirteen pages of a printed record here which is taken from a stenographic transcript of 2141 pages. The items in question (printed in full as an Appendix to this brief, pp. 75–84, *infra*), the Examiner's inferences from them, and the Commission's differing conclusions are as follows:

a. *Possible network affiliation.*—All of the testimony on this subject appears in pages 288–291 of the printed record (and pp. 75–77, of the Appendix, *infra*). The basic findings of the Examiner and the Commission on this matter are virtually identical (compare R. 102–104 with R. 199–201). Both pointed out that Easton's application stated that a network affiliation was not contemplated, but that Easton would consider carrying network programs if they should become available, if they were not already received in the Easton area, and if they would not interfere with the applicant's plan to give a complete local service to the community. On direct examination the proposed general manager of the Easton applicant's station made no reference to network programs. On cross examination he stated that the "present plan" (as distinguished from Easton's plans at the time of the first hearing) did not include net-

work programs and that there had been no conversations with a network for five years. He later stated that there was a possibility that an affiliation agreement might be entered into in the remote future, and then that if, after Easton received a license, a desirable network affiliation seemed to be available, "we would probably call them". The Examiner thought that the applicant had "swayed back and forth in the breeze of indecision on this point" (R. 142), and that its witness, as shown by the content of his testimony, had "displayed an attitude of evasiveness and lack of candor on the subject" (R. 143; see pp. 56–61, *infra*).

The Commission concluded, however (R. 205):

> We are satisfied from our examination of the testimony in question, as well as from the record as a whole, that there is no persuasive indication of reluctance, evasiveness, or lack of candor on the part of the Easton witnesses, and that, to the contrary, the testimony of such witnesses properly viewed, gives an overall appearance of consistency, candor, and straightforwardness. Concerning the network affiliation and programming plans of the applicant, we think the testimony is nowhere inconsistent with the applicant's position that a network affiliation is not presently planned, but may occur if a desirable affiliation becomes available in the future. The failure to testify as to network plans on direct examination does not appear to be significant in the ab-

sence of a present plan to affiliate and program proposals based on such a plan.

b. *Circulation of out-of-town newspapers.*—All of the testimony on this subject appears in the printed record in pages 278–280, 281–284 (and Appendix, *infra*, pp. 77–83). The basic findings of the Examiner and the Commission are identical, except that the Commission's point out the difference between circulation in the city of Easton and in the Easton *area* (compare R. 66 with R. 172). In response to a question from his counsel asking what papers are published or circulated in the Easton area, the witness listed some five dailies besides those in New York and Philadelphia, and seven weeklies. In response to a question concerning the circulation of the Bethlehem and Allentown papers, the witness referred to figures published by an association of the newspapers in the area, and read the total circulation for those papers. On cross-examination the witness pointed out that the association's circulation figures for Easton included only the city itself and several small towns, not including Allentown and Bethlehem (which are in the same metropolitan area), and gave the listed circulation for the Allentown and Bethlehem papers in Easton. After a long line of questions concerning the circulation of various daily papers *in Easton*, the witness was asked whether he had any circulation figures for the weekly newspapers. He said he did not. (R. 283.) When counsel

asked whether they were all small papers, the witness gave their approximate total circulation (R. 283). The witness also stated that he had not intended to imply on direct examination that these weekly papers had any circulation in Easton (R. 284).

The Examiner thought that the witness, in listing all the papers published and circulated in the Easton *area,* even though the circulation of those papers in Easton itself was minimal, tried to create the misleading impression that Easton's newspaper had substantial competition (R. 144), and that he was being evasive when he first denied having figures for the circulation of the weekly papers and then gave the approximate total circulation (R. 144). The Commission disagreed (R. 205–206), pointing out the context in which the questions were asked, and noting the distinction, which had been ignored by the Examiner, between circulation in the city of Easton and in the general area which was the subject of the hearing.[19]

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[19] The witness merely read into the record figures from a publication available to all the parties. His original statement with respect to the circulation of Allentown and Bethlehem dailies was in response to a question asking for the circulation figures for those papers, and it was preceded by a reference to a question in the first hearing about the circulation of the Bethlehem newspaper. In his dissenting opinion, Judge Prettyman treated of this matter as follows (R. 327):

"I note a few features of this episode. (1) No false statement is alleged to have been made. One counsel asked for

c. *The 1950 dividend payment.*—All of the testimony on this subject appears at R. 285–286 (Appendix, *infra*, pp. 83–84). In response to a question asking the size of the dividend paid by Easton in 1950, the witness refused to state the exact figure without checking his records. The Examiner thought that a person as familiar with the affairs of the company would have the figure at his finger tips (R. 144). The Commission found that his inability to state the size of the dividend was "not incomprehensible in view of the apparent lack of any reason to be prepared to answer such a question," and that this could not "give rise to a finding of evasiveness in the absence of any showing that he actually knew the answer and was attempting to evade placing it in evidence" (R. 206).

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some figures, and his opponent asked for more. All were truly given. (2) The nub of the present point is an impression on the part of the examiner that the witness attempted to create an impression. If it was an attempt by the witness it was not too smart an attempt. All the figures were apparently in the same publication, readily available to anybody. (3) The point was trivial. The Easton Press is the only paper published in Easton. How many out-of-town papers were sold there was of minimal importance. (4) Trial counsel generally will be startled to learn that, if they inquire about a subject and an opponent develops further facts about it, this court is of opinion that the failure of initial full development upon direct examination can, in the absence of any false statement, be used as a basis for reducing all the testimony on that side of the case to less than substantiality. I think so mighty a conclusion cannot properly be drawn from so tiny a premise."

The Court of Appeals recognized that, in its consideration of each of the three foregoing items, the Commission had carefully appraised the Examiner's conclusions in reaching its contrary conclusions. The majority, however, rejected the Commission's finding that the Examiner had based her findings "primarily on what was thought to be conflicts in the testimony of such witnesses, the eliciting by cross-examination of certain information which the Examiner considered should have been made clear during the witness' direct testimony, and a professed lack of knowledge of a matter which the Examiner considered the witness reasonably should have known" (R. 205). Instead, the court concluded, the Examiner had based her findings of evasiveness and lack of candor "in large part" on her "evaluation of the demeanor, bearing, delivery, etc.," of the witnesses. The court accordingly found itself free under this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, and the opinion of the Court of Appeals for the Second Circuit in the same case on remand (190 F. 2d 429), to reverse the Commission unless there was a "very substantial preponderance" of record evidence to support the Commission's reversal of its Examiner. (R. 319–320.) And it found no such preponderance.

Each of the court's conclusions, we submit, is unsound. (1) The Examiner did not purport to

base her conclusions as to evasiveness or lack of candor on the bearing or demeanor of the witnesses, nor is any such evaluation a necessary part of her findings, as the court below apparently believed. (2) More important, the *Universal Camera* decision does not impose, but plainly warns against, a "substantial preponderance" test for agency review of an examiner's findings, even in situations which, unlike the present one, do involve consideration of demeanor by the examiner in determining what is to be found as a fact. (3) Finally, it is clear, from an examination of the record, that the Commission was correct in its conclusion that the testimony criticized by the Examiner failed to disclose any evasion or lack of candor on the part of the Easton witnesses.

1. Both before and since the *Universal Camera* case courts have stressed the special consideration which must be given to the determinations of the trier of fact when they are based upon his observation of the demeanor of witnesses. Such reliance upon witnesses' demeanor may be manifested by the trier's express statement of his mental processes, or it may be inferred from the nature of the determination he has made. A typical example of a determination in which it may be assumed that demeanor evidence played a part is that which occurs in many Labor Board cases where an issue of fact concerning the reason for the firing of an employee requires the resolution of conflicting testimony given by several wit-

nesses. In such a case, the decision of the examiner to give credence to one line of testimony and to discredit conflicting testimony may be based, in part at least, upon observation of the demeanor of the witnesses.[20] And the same is true when a trier of fact accepts as true or rejects as false the uncontradicted testimony of a single witness.[21]

But where the inference drawn from the testimony of a witness is something other than whether it is true or false (as, for example, in this case, whether the testimony reflects upon the character qualifications of an applicant), it cannot be assumed that the inference is necessarily based, even in part, on the demeanor of the witness.[22] In such a case reliance on demeanor can only be discovered either from an express statement by the Examiner that demeanor evidence was in fact involved in reaching the conclusion, or from some other extrinsic evidence to this effect. In the present case, on the other hand, not only is there lacking any express statement or other evidence of reliance upon demeanor, there is an affirmative demonstration by the Examiner

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[20] See, e. g., *National Labor Relations Board* v. *Chautauqua Hardware Corp.*, 192 F. 2d 492 (C. A. 2).

[21] *Quock Ting* v. *United States*, 140 U. S. 417; *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (C. A. 9), affirmed, 346 U. S. 482.

[22] This is the distinction between "testimonial" and "derivative" inferences discussed in *American Tobacco Co.* v. *The Katingo Hadjipatera*, 194 F. 2d 449 (C. A. 2), and *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484 (C. A. 2), referred to by Judge Prettyman below (R. 329).

in her decision that she based her judgment on what the witnesses said or failed to say rather than on their manner of saying it or general bearing.

Thus, immediately following the Examiner's statement in her decision that an Easton witness "displayed an attitude of evasiveness" on the subject of Easton's plans for a network affiliation (R. 143), she went on to explain the basis for this conclusion. She referred to a paragraph of her findings (Par. 126, R. 102–104) in which the witness' testimony on this subject is set forth verbatim, and quoted excerpts from this testimony which she felt supported her conclusion of evasion and lack of candor. There is no indication in the Examiner's opinion that she relied upon anything other than the cited record testimony in reaching her conclusion. Similarly, the Examiner's statement that the "testimony" of an Easton witness "created the impression", on direct examination, that the Easton Express had substantial competition from Allentown and Bethlehem papers, but that he "admitted" on cross-examination that the circulation of the competing papers was minimal, is clearly based upon the Examiner's evaluation of the testimony of record, rather than the manner of its presentation (R. 144, 66). Indeed, she introduced this observation by pointing out that it came from a "study of this record" (R. 144), and her remarks leave no doubt that it was

nothing more. She simply believed from their content that the *statements* of the witness were misleading—a belief which the Commission, properly we think, found itself unable to share (*supra*, pp. 10–11, 46, 49–53). The point of present importance, at any rate, is that the "study of this record" was ultimately the responsibility of the Commission, and was a task the Commission was in no way disabled from performing.

The court below found an indication in the phrasing of the Examiner's conclusions on evasiveness and candor that these were based on demeanor, because she said a witness "displayed an attitude of evasiveness" with respect to a possible network affiliation and "created an impression" contrary to the later developed facts as to competition of other newspapers with that of the Easton applicant. "Attitudes displayed and impressions created by a witness", the court stated, "are *usually* demonstrated by hesitations, intonations and inflections of voice, gestures, etc., as well as by what appears in the record" (R. 319, fn. 21, emphasis added). But even if we assume that this is "usually" the case, it is clear from what the Examiner herself stated that in this case her conclusions were based on no such considerations.

Here, the Examiner drew inferences as to character, not from demeanor (mannerisms, expressions, or other such phenomena, observable only by her), but from the content of admittedly

true statements of the witnesses, which were amplified accurately upon further questioning. Thus, the Examiner did not find that Easton intended to do otherwise than as its witness testified with respect to assuming a network affiliation. On the contrary, one of her conclusions adverse to Easton was that although at some time in the future it might seek and acquire a network affiliation, it had not shown which local programs it would drop in the event a network affiliation was ultimately obtained (R. 143). In other words, she believed the testimony on a possible network affiliation (and that testimony accorded exactly with the representation made by Easton in its application). But she thought that the statements of Easton's witness on this subject in the course of clarifying its position were sufficiently unclear for her to conclude that Easton was not as frank as applicants before the Commission should be (R. 145). This was not a finding of credibility, but a "derivative inference" based on the contents of the testimony. Similarly, with respect to the circulation of out-of-town newspapers in Easton, the Examiner accepted the testimony of the Easton witness (R. 66–67, 320). Here again, her conclusion as to the applicant's character was inferred from the content of the testimony.

A fair reading of the brief portions of the Examiner's decision in issue can support no other conclusion. As we have noted, the question

whether triers of fact have relied upon demeanor can only be answered by examining the nature of their determination and what they have said about it. Hearing examiners for administrative agencies—schooled in the task of explaining what they have done and why they have done it, and recognizing that their written decisions must provide intelligible aids to the ultimate decisions, which are the agency's responsibility—frequently make explicit their judgments based upon demeanor.[23] On the other hand, the references of the Examiner in this case to "attitudes displayed" and "impressions created" by the wit-

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[23] See, e. g., *Andrews Co.*, 87 N. L. R. B. 379, 391, 392 (one witness' "demeanor * * * was hesitant and wavering," another's "demeanor and testimony demonstrated a belligerent temperament"); *Pinkerton's National Detective Agency*, 90 N. L. R. B. 205, 224 (witness "looked inquiringly" at union representative before answering questions, had to be requested to look at questioner, "was not a straightforward witness"); *Happ Brothers Company, Inc.*, 90 N. L. R. B. 1513, 1566, set aside on other grounds, 196 F. 2d 195 (C. A. 5) (witness "extremely nervous," "broke into tears" for no apparent reason, displayed "evident unhappiness at the predicament into which her conflicting and confused testimony had gotten her"); *WKRG-TV, Inc.*, 10 Pike & Fischer, Radio Regulation 225, 252 (examiner credited witnesses whose "general demeanor and forthright manner of address as witnesses carried an unusually high degree of persuasiveness"); *Garfield Medical Apparatus Co.*, 8 Pike & Fischer, Radio Regulation 958, 975–979 (in affirming examiner's unreported decision, the Commission pointed out that he had relied, in choosing between lines of conflicting testimony, upon his observation and evaluation of the demeanor of witnesses).

nesses are, when read in their context, merely descriptive of what was conveyed to her by the substance of the testimony the witnesses gave. The whole focus of her discussion is on the testimony. Not a concrete word is said about demeanor or suggests reliance upon it. In short, as the dissenting judge below stated (R. 328, 330), the Commission was clearly justified in concluding that her conclusions as to evasiveness and lack of candor were "based primarily, if not exclusively, upon her interpretation of the testimony offered rather than the demeanor of the witnesses involved" (R. 260, fn. 2). And the Commission was in just a good a position as the Examiner to draw inferences from that testimony in the record, even though it did not see or hear the witnesses.

To give exclusive or primary significance to the Examiner's conclusions in this situation goes far beyond the holding of this Court in the *Universal Camera* case. In discussing the significance of the Examiner's report in review of agency action by appellate courts, this Court there stated (340 U. S. at 496):

> We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence sup-

> porting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of the testimony. *The significance of his report, of course, depends largely on the importance of credibility in the particular case.* [Emphasis added.]

Nothing in reason or judicial experience suggests that in the situation here presented the Commission is less competent than its Examiner to arrive at conclusions respecting the character qualifications of an applicant based upon testimony of record. Indeed, such judgments lie at the heart of the Commission's responsibility. And, as we have shown, "credibility" played no meaningful role in the Examiner's observation that the Easton applicant, though fully qualified, had been "evasive" in that a witness' testimony did not disclose at once all the facts elicited a moment later by further questioning—or that, in another instance, a witness stated an inability to give from memory a figure for which everyone knew records were available and which could readily have been obtained from these records if the matter had been more than utterly trivial. In such circumstances, it distorts the relative

roles of agency and examiner to give the latter's appraisals of the record a status approaching unreversible finality.

Appellate courts have much more severely restricted powers of review of lower court findings than administrative agencies have over the findings of examiners. Yet appellate courts do not hesitate, in an appropriate case, to substitute their own "derivative inferences" for those made by a trial judge, although they will not disturb a trial judge's "testimonial" or direct credibility inferences. *American Tobacco Co.* v. *The Katingo Hadjipatera,* 194 F. 2d 449 (C. A. 2). *A fortiori,* an administrative agency may substitute its own "derivative inferences" for those of its examiner, where such inferences rest on the significance of the recorded testimony as accepted or rejected by the examiner. This is particularly true with respect to "findings" of the type involved here—relating peculiarly to the kind of ultimate judgment for which the agency alone is responsible.

2. Leaving no doubt of the difference between the relationship of an appellate court to a trial court and that of an administrative agency to an examiner, this Court in the *Universal Camera* case said (340 U. S. at 492): "The responsibility for decision * * * placed upon the [agency] is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when

they are 'clearly erroneous.'"[24] Thus, even if it could be argued that the Examiner's finding of lack of candor in the disputed portions of Easton's testimony was in some degree an inference from "demeanor evidence," the standard applied by the court below for judging the validity of the Commission's contrary finding was improper. Rejection of the Examiner's findings, the court said, could be justified only by a "very substantial preponderance in the testimony" (R. 319–320). As the dissent noted (R. 329), the court cited, in reaching this conclusion, cases involving review by appellate courts as well as cases of agency findings contrary to examiners'. It would be hard to distinguish between a rule that findings may be reversed only when "clearly erroneous" and a rule that reversal may be justified only by a "very substantial preponderance in the testimony." The latter formula can no more be justified than the former under this Court's decision in *Universal Camera*.

The decision in *Universal Camera* settled, of course, what many courts and commentators had long asserted—that, in determining whether an agency's decision is supported by substantial evidence on the record as a whole, a reviewing court must "give to the examiner's report such pro-

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[24] Cf. *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 285–6: "[T]he Commission had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence."

bative force as it intrinsically commands." 340 U. S. at 495. For "an examiner's report is as much a part of the record as the complaint or the testimony" (*id.* at 493), and the court is enjoined to consider the record "as a whole." This Court cautioned, however, that the need to appraise the examiner's report for its probative force in each particular record should not obscure the fact that it is the agency's responsibility to decide, that an agency need not find its examiner's findings "clearly erroneous" in order to disagree with them, and that it is the agency's decision which must be sustained if it is supported by "substantial evidence" on the whole record, including the examiner's report (*id.* at 496–497, quoted *supra*, pp. 61–62).

These admonitions are, in our view, clearly contrary to the test of "very substantial preponderance" adopted by the court below from the opinion of Judge Learned Hand in the *Universal Camera* case on remand from this Court. 190 F. 2d 429, 430. We have no occasion here, of course, to quarrel with the actual result in the latter case. The issue there—relating to a critical matter of the motive for discharge of an employee—was in fact an issue of "veracity" or "credibility" in the strictest sense. But we believe the formula announced by Judge Hand (and questioned in Judge Frank's concurring opinion) is in its terms an extreme one; that it suggests an approach out

of harmony with both *Universal Camera* and the administrative agency's "responsibility for decision" stressed by this Court; and that, above all, its application in the circumstances of this case has led to error.

It may well be that, in a particular case where decision turns on whether a witness lied or told the truth concerning a vital issue, an examiner's finding on credibility will be almost impossible to assail. But the problem in such a case, as in every case, is not the quantum of evidence required to "reverse" the examiner, but whether "substantial evidence on the record considered as a whole" sustains the findings of the agency. The distinction we suggest may be unimportant in most cases. But it focuses on the problem properly before the reviewing court. It prevents such a court from supposing—as the language of some decisions suggests some courts may have supposed—that the question is whether to "affirm" the examiner or affirm the agency. See *Boeing Airplane Co.* v. *National Labor Relations Board*, 217 F. 2d 369, 373, 374, 378 (C. A. 9) (court "affirms the findings of the Intermediate Report in their entirety"; "affirms the Board in accepting the findings of the Examiner" as to some issues; finds that "the attitude and temper of the Examiner were more judicial"; and "disapproves the findings of violations contrary to those of the impartial hearing officer"); *United States Steel Co.* v. *National Labor Relations Board*, 196 F.

2d 459, 465, 467 (C. A. 7) ("The record as a whole substantiates the finding of the trial examiner," and the court accepts this finding rather than the Board's); *Ohio Associated Tel. Co.* v. *National Labor Relations Board*, 192 F. 2d 664, 668–669 (C. A. 6) (examiner's "finding is sustained by substantial evidence and * * * the Board was in error in disapproving the examiner's recommendation").[25] And it points up the error of the court below in rejecting the Commission's findings because it was not "convinced" that there was "a very substantial preponderance" in the testimony to refute the Examiner's findings.

3. Judged by the proper test of "substantial evidence" applicable to the *agency's* findings, the Commission's decision on the problem of "candor" should have been sustained. We reemphasize in this connection that the Examiner's finding which the Commission rejected is not a finding of "credibility" at all. And we note that although the majority below thought it rested to some degree on "demeanor evidence," the majority went no further than to say the finding "is not derived *solely* from evidence preserved in the printed record" (R. 319, fn. 21, emphasis added).

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[25] See also the majority opinion below (R. 320): "We think the Examiner rightly concluded that the witness sought to create the misleading impression that his newspaper had substantial competition from the Allentown and Bethlehem dailies." And with this compare the dissent (R. 326–327).

Even accepting this characterization of the finding, it is apparent that what was done mainly by the Examiner, by the Commission, and by both the majority and the dissenting judge below was to consider whether evasiveness was displayed by part of the testimony of two Easton witnesses—testimony covering the few pages reproduced in the Appendix to this brief as against the 307 pages of testimony by these witnesses in the stenographic transcript. The majority below agreed with the Examiner's view. Judge Prettyman, commending the Commission for the meticulous care shown in its findings (R. 323), defended the Commission's view in an exhaustive analysis upon which we strongly rely (R. 324–330). Without repeating that analysis or detailing again the reasoning on which the Commission held the finding of evasiveness unwarranted (see pp. 49–53, *supra*), we submit that there was at most a close balance between the views of Examiner and Commission. In these circumstances, it is pertinent to recall this Court's declaration in *Universal Camera* that the statutory requirement of review of "the whole record" in determining the adequacy of agency findings does not mean "that even as to matters not requiring expertise a court may displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." 340 U. S.

at 488. The court below, though it sided with the Examiner in the process, chose one of "two fairly conflicting views." Such a choice cannot justify reversal of the Commission's decision, which was reasonable and supported by substantial evidence on the record as a whole.

E. EASTON'S PROGRAMMING AND OWNERSHIP OF OTHER COMMUNICATIONS MEDIA

Two conclusions of the court below remain for consideration here: (1) That the programming plans of the Easton applicant were uncertain because it was not definite whether a network affiliation would be obtained in the future (R. 318–319). (2) That since this applicant owned the only newspaper, the only television station, and one of the two FM stations in Easton, and though the Commission had considered this very matter in ruling the applicant qualified, the Commission should have further appraised a discontinued practice of Easton's newspaper "in weighing the relative abilities of the competing applicants" (R. 320–322). Although it adopts the conclusions of the Examiner on these aspects of the case, the court does not base its decision upon the primacy of the Examiner's views. There was no disputed testimony on these subjects, and the basic findings of the Commission were essentially those of the Examiner (compare R. 102–104 with R. 199–201, and R. 66 and 133 with R. 170–172). The problems were carefully considered

by the Commission and it reached conclusions contrary to the Examiner's with respect to their significance (R. 214–215, 206–207). The Commission's conclusions were reasonable. The court below, substituting its judgments for those of the Commission, invaded a province beyond the proper scope of review.

1. The Commission carefully considered the Examiner's conclusion that the record did not disclose with the required certainty the program service which would be rendered by the Easton applicant in the event that its application was granted, because of its failure to show which programs would be dropped if a network affiliation was subsequently secured. The significance of this lack is necessarily dependent upon the licensing policies and practices of the Commission and its experience in the licensing of radio stations. The Commission held in this respect (R. 215):

> The fact that an affiliation may be entered into in the future if a desirable arrangement becomes available does not render these proposals so uncertain as to preclude any findings or conclusions based thereon. Program proposals are not a rigid straightjacket beyond which future operation of the station must never vary. A certain flexibility with the passage of time is not only permissible but also desirable if the licensee is to be free to carry out his responsibility to program in the public interest. Of course, program pro-

> posals are not something to be forgotten once a grant is obtained, and must not be used in such a way as to mislead the Commission as to the intentions of the applicant. There is no evidence that such is the case here. The applicant has frankly stated that a network affiliation is not now planned but may be entered into in the future if a desirable affiliation becomes available. And, it is also stated in the application that should such an affiliation occur, the applicant's plans for a complete local program service would not be disrupted.

This judgment lay peculiarly within the field of the Commission's expertise. Its reasonableness is, we think, apparent on its face. It is, at the least, not so clearly unreasonable—nor did the court below suggest that it was—as to warrant reversal of the Commission's decision.[26]

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[26] In discussing this matter the court below entirely overlooked the Commission's continuing regulatory responsibility with respect to broadcast licensees. The Communications Act requires that broadcast licenses be renewed at no greater than three year intervals, and that renewals should be granted only if the public interest would be served thereby, see Section 307 (d), 47 U. S. C. 307 (d). In considering applications for renewal of license the Commission reviews the station's program service in light of its commitments at the time the license was secured, and there is no doubt that a serious programming deficiency could constitute appropriate grounds for failure to renew a license. *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 47 F. 2d 670 (C. A. D. C.); *Trinity Methodist Church, South* v. *Federal Radio Commission*, 62 F. 2d 850 (C. A. D. C.), cer-

2. As to the Easton applicant's ownership of the City's only newspaper and television station, and one of two FM radio stations, neither the Examiner nor the court below suggested that these were disqualifying factors. The court pointed out, however (R. 321), that the Easton newspaper, from 1936 to 1948, had failed to carry program logs of the community's one local AM station—a situation the Commission had noted, of which it had expressly stated it did not approve, but which had been discontinued and thus was not deemed to be disqualifying (R. 207). The court's objection in this regard appears to have been mainly to the Commission's failure to consider these matters to compare the relative abilities of the competing applicants (R. 321). If, as we have argued in Point I, no such comparison was required, this issue largely disappears.

We re-emphasize, however, that the factors here considered are nowhere claimed to disqualify the Easton applicant for the license the Commission granted. As to the possible problem of monopolization of communications media—a problem with which the Commission, as the court below recognized (R. 321), has been actively concerned—it is to be noted that the grant of the Easton applicant's license for an AM station actually brings competition to the community in this type of broad-

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tiorari denied, 288 U. S. 599; cf. *G. A. Richards*, 5 Pike & Fischer, Radio Regulation 1292 (1950); *Thomas Lee Enterprises, Inc.*, 5 Pike & Fischer, Radio Regulation 1179 (1949).

casting, which has heretofore been monopolized by a single station not owned by the present applicant. Making this point in his dissent (R. 330), Judge Prettyman went on to observe that

> the permissible amount of concentration of mass communication, involving broadcast stations and newspapers, is peculiarly a problem for the Commission. Here, indeed, is a regulatory problem. Ownership of a station by a newspaper can hardly be denounced per se. In the District of Columbia, two of the four radio-television stations are owned by newspapers. In the instant case the Commission weighed many factors in this connection and produced a judgment on the point. I think the court should let it alone.

We submit that the dissent was correct. In reversing the Commission's decision, the majority below rested primarily upon an erroneous and unworkable standard for the disposition of cases like this one (Point I, *supra*). The court's decision is equally erroneous to the extent that it rests upon judgments of policy substituted for the Commission's, which are reasonable, supported by the record, and wholly within the authority and competence of the Commission.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed and the order of the Commission granting the application of Easton Publishing Co. and denying that of Allentown Broadcasting Corp. should be affirmed.

Respectfully submitted.

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MARCH 1955.

APPENDIX

A. TESTIMONY AS TO POSSIBLE NETWORK AFFILIATION, R. 288–291

By Mr. ROLLO:

Q. I notice in your analysis of Exhibit No. 84, your proposed program schedule, that you do not include any network programs on your proposed AM schedule.—A. That is correct.

Q. That is your present plan, is it?—A. That is the present plan.

Q. You no longer desire to affiliate with Mutual?—A. There has been no conversation with Mutual in the past five years.

Q. You recall you originally testified you planned to affiliate with Mutual, do you not?—A. I said we expected to discuss it with Mutual, but no arrangements have been made.

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By Mr. SCHILDHAUSE:

Q. Mr. Rounsley, you stated, did you not, that you had no current plans to affiliate your proposed AM station with the network?—A. That is correct.

* * * * *

By Mr. SCHILDHAUSE: * * *

A. There would be no time sold for religious programs.

Q. You say that will be a firm policy?—A. That will be a firm policy. I better qualify that. In the event of any network affiliation, any pro-

grams accepted by the network as commercial, any religious programs, may or may not be accepted by the station as commercial. That is in the future, and we made no policy about it.

Mr. ROLLO. Did not you answer a question of mine to the effect that you did not intend to affiliate with the network?

The WITNESS. I did not say we did not intend to, I said we made no overtures at all. That is in the remote possibility that some time in the indefinite future we might affiliate.

By Mr. SCHILDHAUSE:

Q. I presume you or Mr. Stackhouse have discussed, and the Board of Directors, too, I might add, of the Easton Publishing Company have discussed the question of network affiliation. Are you predisposed to accept one if offered?—A. If offered a desirable affiliation, we would certainly consider it.

* * * * *

The PRESIDING OFFICER. Mr. Rounsley, I am a little confused about this network proposition. I wish you would tell me what your plans are with respect to network. Now let us not talk about the dim distant future, let us talk about something not quite so far away.

The WITNESS. If we have an AM facility we would probably explore the possibility of a network affiliation. We would naturally have to see what was available, what the terms are, something we do not know now, but we would explore that possibility.

The PRESIDING OFFICER. Am I to understand you would not wait for somebody to come to you?

The WITNESS. That is correct. In other words, we would have to have something to affiliate before we talk business.

The PRESIDING OFFICER. It is still not clear in my mind. Do you plan to sit by and wait for somebody to approach you, or what would be your procedure?

The WITNESS. I think we would probably see what was available, and after we saw what was available, if there was a network that we thought was desirable and available, we would probably call them.

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TESTIMONY AS TO CIRCULATION OF OUT-OF-TOWN NEWSPAPERS, R. 278–280, 281–284

By Mr. LOVETT:

Q. What, if any, other newspapers are published or circulated in the Easton area?—A. Well, the Allentown and Bethlehem dailies, the Newark News, that is Newark, New Jersey, the Plainfield, New Jersey, Courier, and there is a daily at Bangor, Pennsylvania, and the Philadelphia and New York newspapers, dailies. In addition there are several weekly newspapers published and circulated in the area. These include the Phillipsburger, at Phillipsburg, New Jersey, the Star at Washington, New Jersey, the Hunterdon Democrat and Hunterdon Republican at Flemington, New Jersey, and then there are weeklies in the Pennsylvania area published at Nazareth, Windgap and Pen Argyle, I believe, and also at Portland, Pennsylvania.

Q. Have you concluded?—A. Yes.

Q. During the hearing in Allentown some question was asked regarding the circulation of the Bethlehem paper. Do you happen to know the circulation of both the Bethlehem papers and Allentown papers?—A. All of the newspapers in the valley are members of an association known as the Audit Bureau of Circulations. The Audit Bureau of Circulations is composed of members of daily newspapers totaling 1,193 and certain——

Mr. ROLLO. I concede the accuracy of the ABC figures, if that will save any time.

The PRESIDING OFFICER. Very well.

The WITNESS. That is all right. Excuse me. The reports of the Audit Bureau of Circulations for the twelve months' period ending September 30, 1950, show the following average paid circulations for that period: The Easton Express, 43,489, which is an evening publication. The Bethlehem Globe-Times, 23,779, an evening publication.

Mr. ROLLO. What was that figure again?

The WITNESS. 23,779. The Evening Chronicle of Allentown, 20,257, an evening publication, and the Morning Call, 58,250, a morning publication.

By Mr. LOVETT:

Q. That is in Allentown, The Morning Call?—A. Allentown, yes, sir, and the Chronicle, also Allentown, if I did not state it.

Q. Have any other daily newspapers been published in Easton since the formation of the Easton Publishing Company?—A. Yes.

Q. Will you name them and tell what happened to them?—A. The afternoon Easton Free Press was published for a number of years and was merged with the Easton Express in 1926. About

1940 a daily, which became known as The Morning Free Press was established in Easton and was voluntarily suspended in 1945. It was a newspaper which was printed in Bethlehem and circulated in Easton.

* * * * *

By Mr. ROLLO:

Q. Let us go into the question of circulation of newspapers. Do you have your ABC figures before you?—A. Yes, sir.

Q. With respect to the circulation of the Easton Publishing Company, which is 44,400, I believe you said—A. That is the present figure. The average for the 12 months ending September, 1950, was 43,489.

Q. Is that broken down in the report you have before you as to cities or counties?—A. It is.

Q. What is the circulation in the City of Easton?—A. The circulation in the city area which is adopted by the Audit Bureau is 23,931.

Q. Could you state for the record what that area embraces, other than the City of Easton itself?—A. Phillipsburg, New Jersey, Wilson Boro, the boroughs of Glendon, Stockertown, Tatamy, West Easton, the townships of Forks, Palmer, Williams, and in Bucks County Regalsville, and in Warren County Alpha Boro, the townships of Lopatcong and Pohatcong.

Q. Do you know or does the report show what circulation you have in Allentown?—A. It does not.

Q. Do you know of your own knowledge approximately what your circulation is over there?—A. It is under twenty-five.

Q. How about Bethlehem?—A. That is also under twenty-five.

Q. Now the other daily papers that you referred to, I believe the Newark News was one of them, was it not?—A. That is correct.

Q. Where is Newark?—A. Newark is approximately 60 miles to the northeast.

Q. Is that Newark, New Jersey?—A. Yes.

Q. Just across the river from New York?—A. That is right.

Q. I see. Do the ABC figures show the circulation in the Easton city zone?—A. Of the Newark News?

Q. Of the Newark News.—A. No; I do not have those figures.

Q. One of the papers you mentioned was the Plainfield Courier.—A. That is correct.

Q. What town was that from?—A. Plainfield, New Jersey.

Q. Where is that?—A. That would be about 30 to 40 miles southeast of Easton.

Q. And about the same distance from New York?—A. Probably 50 miles from New York.

Q. Do you have the circulation figures of that newspaper in Easton?—A. I do not.

Q. Do you have any knowledge as to the number, of your own personal knowledge?—A. I do not.

Q. Does that also apply to the Newark News?—A. Yes.

Q. Now, the next one you mentioned I think was Bangor, Pennsylvania?—A. That is correct.

Q. Where is Bangor?—A. Bangor is about 20 miles approximately north of Easton, or 18 miles north of Easton.

Q. Do you have the circulation figures of that newspaper?—A. They are not available.

Q. They are not a member of the ABC Audit Bureau?—A. That is correct.

Q. Do you know approximately what the circulation is in Easton of that newspaper?—A. I have no knowledge, but I presume it is nil in Easton.

Q. Do you know what the total circulation of the Newark News or Plainfield Courier is?—A. I do not.

Q. Do your ABC reports show the circulation of the Philadelphia or New York newspapers in Easton?—A. Not these that I have.

Q. Do you have reports available on that?—. . I doubt it.

Q. Would you mind looking at your records and bringing them back to the hearing after the noon recess, if you do have them?—A. Yes.

Q. Do you know of your own knowledge what the circulation figures are on the Philadelphia or New York newspapers?—A. I do not.

Q. There is no other daily newspaper in Easton, is there?—A. That is correct.

Q. And I take it that Bangor, Pennsylvania, is the closest to Easton?—A. Yes.

Q. Other than the Allentown newspapers?—A. That is right, Allentown and Bethlehem newspapers.

Q. Do you have the figures on the Allentown or Bethlehem newspapers?—A. I do.

Q. The circulation figures here in Easton?—A. Yes.

Q. Would you state them, please? Now this is for the city zone.—A. Yes.

Q. That is my question.—A. I will qualify that, that I would not know the figures for the Easton city zone. I know only the figures which they show as their circulation for Easton. I do not know what is included in that.

Q. All right, will you give that?—A. Fifty-nine for the Bethlehem Globe-Times. The Morning Call, 453. The Evening Chronicle, 1.

Q. The 453 for the Morning Call includes those delivered by carriers and dealers and mail, is that correct?—A. That is correct.

Q. That was the morning paper, was it not, 453?—A. That is right.

Q. And the evening paper was one?—A. One.

Q. Do you get that one?—A. Probably do.

Q. Do you have any circulation figures on the weekly newspapers you mentioned?—A. No, sir.

Q. They are all small papers, are they not?—A. No, they are not all small. The Hunterton newspaper is approximately 7,000 circulation, the Washington, New Jersey Star is not a member of the ABC but I believe its sworn statement is in the neighborhood of 5,000. The other weeklies' sworn statements are approximately in the neighborhood of 2,000.

Q. The rest that you mentioned?—A. That is right.

Mr. Lovett. Two thousand each?

The Witness. Yes; each.

By Mr. Rollo:

Q. And those are total figures for the weeklies, not their circulation in Easton?—A. No, that is the total, not in Easton.

Q. Now Phillipsburg is one you mentioned.

That is just across the river from Easton, I understand, is that right?—A. That is right.

Q. What was that Washington Star? What town is that?—A. Washington, New Jersey.

Q. Where is that?—A. About 12 miles east of Phillipsburg.

Q. And Hunterton?—A. That would be in Flemington, New Jersey, about 22 miles southeast of Easton.

Q. Were there two weeklies there or just one?—A. Two.

Q. One called the Democrat and the other called the Republican?—A. That is correct.

Q. Where is Nazareth?—A. Nazareth is about eight miles west, a little northwest of Easton

Q. And where is Windgap?—A. Windgap is about 11 miles north of Easton.

Q. And where is Pen Argyl?—A. They are all practically in the same community, about the same distance north of Easton, 11 miles.

Q. And Portland, Pennsylvania?—A. Portland, Pennsylvania is again north about 24 miles.

Q. Do you have available the populations of these towns that we have just enumerated, that have weeklies?—A. I do not.

Q. Was it your testimony on direct examination by Mr. Lovett that these weeklies had any circulation in Easton?—A. It was not intended so; in the Easton area.

TESTIMONY AS TO AMOUNT OF 1950 DIVIDEND, R. 285–286

By Mr. SCHILDHAUSE:

Q. Did the Easton Publishing Company earn a profit last year?—A. Yes, sir.

Q. Approximately how large was it?

Mr. LOVETT. I object, Madam Examiner, as being entirely immaterial.

Mr. SCHILDHAUSE. I will withdraw it.

The PRESIDING OFFICER. Very well.

By Mr. SCHILDHAUSE:

Q. Did the corporation declare dividends last year?—A. Yes.

Q. What was the size of the dividend?

Mr. LOVETT. I object, Madam Examiner, as being entirely immaterial.

Mr. SCHILDHAUSE. It is possible to draw an inference from this record, Madam Examiner, that the beneficiaries of some of the trust held stock in the Easton Publishing Company, may, at a later date, sell off their holdings in the Easton Publishing Company. That being so, I think it is certainly pertinent, and probably material. The question of dividends is certainly pertinent and probably material to the question of whether they will sell off their holdings.

The PRESIDING OFFICER. Objection overruled. The witness may answer.

The WITNESS. Are you speaking of 1950? You said last year, I believe?

By Mr. SCHILDHAUSE:

Q. Does the corporation keep its books on a calendar year basis?—A. That is correct.

Q. For the year 1950 what were the dividends?—A. I do not have the figures here.

Q. What was the size of the dividends per share?—A. I don't know that without checking the record.

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